

SUPREME COURT OF ARKANSAS

No.

Opinion Delivered: 9-18-08

IN RE: RULES OF SUPREME
COURT AND COURT OF
APPEALS, RULE 4-3; RULES OF
APPELLATE PROCEDURE –
CRIMINAL, RULE 4; AND
RULES OF CRIMINAL
PROCEDURE, RULE 24.3

PER CURIAM

The Supreme Court Committee on Criminal Practice submitted three proposals to the court, and we published them for comment at which time the proposals were fully explained. *See In Re: Rules of Supreme Court and Court of Appeals, Rule 4-3; Rules of Appellate Procedure – Criminal, Rule 4; and Rules of Criminal Procedure, Rule 24.3*, ____ Ark. Appx. ____ (June 19, 2008). In addition, the Reporter's Notes discuss the rule changes. We thank everyone who reviewed the proposals, and we again express our gratitude to the members of the Criminal Practice Committee for their work.

Today, we adopt the amendments to Rule 4-3 of the Rules of the Supreme Court and Court of Appeals and Rule 4 of the Rules of Appellate Procedure – Criminal, and republish the rules as set out below. We also adopt the Conditional Plea Form as set out below and direct that the form be appended to Rule 24.3 of the Rules of Criminal Procedure. These amendments are effective October 1, 2008.

Rules of Appellate Procedure - Criminal

Rule 4. Time for filing record, contents of record.

(a) *Generally.* Except as provided in this rule, matters pertaining to several appeals, the docketing, designation, abbreviation, stipulation, preparation, and correction or modification of the record on appeal, as well as appeals where no stenographic record was made, shall be governed by the Rules of Appellate Procedure-Civil and any statutes presently in force which apply to civil cases on appeal to the Supreme Court.

(b) *When filed.* When an appeal is taken by the defendant, the record on appeal shall be filed with the clerk of the appellate court and docketed therein within ninety (90) days from the filing of the notice of appeal, For purposes of determining the date of filing of a notice of appeal, Arkansas Rule of Appellate Procedure -Criminal 2(b) shall apply. The time for filing the record with the clerk of the appellate court may be extended by the circuit court as provided in subsection (c).

(c) *Extension of time.* (1) If any party has designated stenographically reported material for inclusion in the record on appeal, the circuit court, by order entered before expiration of the period prescribed by subdivision (b) of this rule or by a prior extension order, may extend the time for filing the record. A motion by the defendant for an extension of time to file the record shall explain the reasons for the requested extension, and a copy of the motion shall be served on the prosecuting attorney. The circuit court may enter an order granting the extension if the circuit court finds that all parties consent to the extension and that an extension is necessary

for the court reporter to include the stenographically reported material in the record on appeal. If the prosecuting attorney does not file a written objection to the extension within ten (10) days after being served a copy of the extension motion, the prosecuting attorney shall be deemed to have consented to the extension, and the circuit court may so find. If the prosecuting attorney files a written objection to the extension within ten (10) days after being served a copy of the extension motion, the circuit court may not grant the extension unless the circuit court makes the following findings:

- (A) The defendant has filed a motion explaining the reasons for the requested extension and has served a copy of the motion on the prosecuting attorney;
- (B) The time to file the record on appeal has not yet expired;
- (C) All parties have had the opportunity to be heard on the motion, either at a hearing or by responding in writing;
- (D) The defendant has timely ordered the stenographically reported material from the court reporter and either (i) made any financial arrangements required for preparation of the record, or (ii) filed a petition to obtain the record as a pauper; and
- (E) An extension of time is necessary for the court reporter to include the stenographically reported material in the record on appeal.

(2) In no event shall the time for filing the record be extended more than seven (7) months from the date of the entry of the judgment or order, or from the date on which a timely post-judgment motion is deemed to have been disposed of under Arkansas Rule of Appellate Procedure - Criminal 2(b), whichever is later.

(3) If the appellant has obtained the maximum seven-month extension available from the circuit court, or demonstrates (by affidavit or otherwise) an inability to obtain entry of an order of extension, then before expiration of the period prescribed by subdivision (b) of this rule or a prior extension order, the appellant may file with the clerk of the appellate court a petition for writ of certiorari pursuant to Rule 3-5 of the Rules of the Supreme Court and Court of Appeals.

(d) *Exhibits*. Photographs, charts, drawings and other documents that can be inserted into the record shall be included. Documents of unusual bulk or weight shall not be transmitted by the trial court clerk unless the clerk is directed to do so by a party or by the clerk of the appellate court. Physical evidence, other than documents, shall not be transmitted unless directed by an order of the appellate court. If the record contains photographs, DVDs, or any other visual medium alleged by either party to the appeal to constitute child pornography, a motion to seal the record, stating the reason therefor, shall accompany the record when it is filed with the clerk of the appellate court.

(e) *Record for preliminary hearing in appellate court*. Prior to the time the complete record on appeal is settled and certified as herein provided, either party to the appeal may docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for fixing or reducing bail, to proceed in forma pauperis, or for any intermediate order. The clerk of the trial court, at the request of the moving party, shall certify and transmit to the clerk of the appellate court a copy of such portion of the record of proceedings as may be available or needed for the purpose.

(f) Subsections (b) and (c) of this rule shall not apply to an appeal by the state

pursuant to Rule of Appellate Procedure-Criminal 3.

Reporter's Notes to Rule 4 (2008).

The 2008 changes added subsections (b), (c), and (f), added the last sentence of subsection (d), and made minor editorial changes to the other subsections.

Prior to the 2008 changes, an extension of time to file the record in a criminal case was governed by Arkansas Rule of Appellate Procedure -Civil 5(b), which requires the circuit court to find that all parties have had the opportunity to be heard on an extension motion. Subsection (c) requires the court to make such a finding only if the prosecuting attorney objects to the extension. The extension order must reflect that the prosecuting attorney consents to the extension, but defense counsel can either obtain such consent before filing the extension order or such consent can be presumed from the prosecutor's failure to object to the extension motion.

The last sentence of subsection (d) protects the privacy of innocent victims of child pornography. A similar change, covering the contents of briefs on appeal, has been made to Rules of the Supreme Court and Court of Appeals 4-3.

Subsection (f) makes clear that the state cannot request an extension of time to file the record when it takes an appeal pursuant to Arkansas Rule of Appellate Procedure - Criminal 3.

Rules of Supreme Court and Court of Appeals

Rule 4-3. Briefs in criminal cases.

(a) *Briefs in chief— When the state is the appellee.* In criminal cases in which the State is the appellee and in which appellant is not indigent, the appellant shall have 40 days from the date the transcript is lodged to file 17 copies of the brief with the Clerk. Upon the filing of the brief, the appellant shall submit proof of service of two additional copies of the brief upon the Attorney General and one copy upon the circuit court, except as otherwise provided in (f).

(b) *Briefs in chief— When the state is the appellant.* In criminal cases in which the State is the appellant, the procedure shall be the same as in subsection (a) except the State shall file only 17 copies of the brief with the Clerk and furnish evidence of service upon opposing counsel and the circuit court, except as otherwise provided in (f).

(c) *Appellee's brief.* The appellee shall have 30 days from the filing of the appellant's brief to file 17 copies of the brief with the Clerk and such further abstract and Addendum as may be necessary to a fair determination of the case. Proof of service upon opposing counsel and the circuit court is required, except as otherwise provided in (f).

(d) *Reply brief.* The appellant shall have 15 days from the date that the appellee's brief is filed to file 17 copies of the reply brief and furnish evidence of service upon the opposing counsel and the circuit court.

(e) *Page limits on briefs.* The argument portion of the appellant's and the appellee's

briefs shall not exceed 25 double-spaced typewritten pages including the conclusion, if any, with a 15 typewritten page limit upon the reply brief, except that if either limitation is shown to be too stringent in a particular case, and there has been a good faith effort to comply with the page limits, it may be waived on motion.

(f) *Sealing of child pornography.* If a brief contains photographs, DVDs, or any other visual medium alleged by either party to the appeal to constitute child pornography, a motion to seal the brief, stating the reason therefor, must accompany the brief when it is filed with the Clerk of the Court. Only the court, its personnel, and the attorneys of record shall be provided with copies of briefs containing the materials to be sealed. All other persons to be served with the brief shall receive copies which do not contain the materials to be sealed.

(g) *Misdemeanor cases subject to dismissal.* In misdemeanor cases, failure of the appellant to file a brief within the time limit renders the case subject to dismissal as in civil cases pursuant to Rule 4-5.

(h) *Appellant's duty to abstract record.* In all felony cases it is the duty of the appellant, whether represented by retained counsel, appointed counsel or a public defender, or acting pro se, to abstract such parts of the transcript and to include in the Addendum such parts of the record, but only such parts, as are material to the points to be argued in the appellant's brief.

(i) *Court's review of errors in death or life imprisonment cases.* When the sentence is death or life imprisonment, the Court must review all errors prejudicial to the appellant in accordance with Ark. Code Ann. Sec. 16-91-113(a). To make that

review possible, the appellant must abstract, or include in the Addendum, as appropriate, all rulings adverse to him or her made by the circuit court on all objections, motions and requests made by either party, together with such parts of the record as are needed for an understanding of each adverse ruling. The Attorney General will make certain and certify that all of those objections have been abstracted, or included in the Addendum, and will brief all points argued by the appellant and any other points that appear to involve prejudicial error.

(j) *Preparation of briefs for indigent appellants.* When an indigent appellant is represented by appointed counsel or a public defender, the attorney may have the briefs reproduced by submitting one unbound double-spaced typewritten manuscript to the Attorney General and one to the Clerk not later than the due date of the brief. In such instances, the time for the filing of the Attorney General's brief is extended by five days.

(k) *Withdrawal of counsel.*

(1) Any motion by counsel for a defendant in a criminal or a juvenile delinquency case for permission to withdraw made after notice of appeal has been given shall be addressed to the Court, shall contain a statement of the reason for the request and shall be served upon the defendant personally by first-class mail. A request to withdraw on the ground that the appeal is wholly without merit shall be accompanied by a brief including an abstract and Addendum. The brief shall contain an argument section that consists of a list of all rulings adverse to the defendant made by the circuit court on all objections, motions and requests made by either party with an

explanation as to why each adverse ruling is not a meritorious ground for reversal.

The abstract and Addendum of the brief shall contain, in addition to the other material parts of the record, all rulings adverse to the defendant made by the circuit court.

(2) The Clerk shall furnish the appellant with a copy of the appellant's counsel's brief, and advise the appellant that he or she has 30 days within which to raise any points that he or she chooses, and that this may be done in typewritten or hand printed form and accompanied by an affidavit that no paid assistance from any inmate of the Department of Correction or of any other place of incarceration has been received in the preparation of the response.

(3) The Clerk shall serve all such responses by an appellant on the Attorney General, who shall file a brief for the State, pursuant to sections (e) and (j) of this Rule, within 30 days after such service and serve a copy on the appellant, as well as on the appellant's counsel.

(4) After a reply brief has been filed, or after the time for filing such a brief has expired, the motion for withdrawal shall be submitted to the Court as other motions are submitted. If, upon consideration of the motion, it shall appear to the Court that the judgment of the circuit court should be affirmed or reversed, the Court may take such action on its own motion, without any supporting opinion.

(l) Continuances and extensions of time.

(1) The Clerk or a deputy clerk may extend the due date of any brief by seven (7) calendar days upon oral request. If such an extension is granted, no further extension

shall be granted except by the Clerk for compliance with these Rules as provided in Rule 4-2(c) or by the Court upon a written motion showing good cause.

(2) Stipulations of counsel for continuances will not be recognized. Any request for an extension of time (except in (1)(1)) for the filing of any brief must be made by a written motion, addressed to the Court, setting forth the facts supporting the request. Eight copies of the motion are required. Counsel who delay the filing of such a motion until it is too late for the brief to be filed if the motion is denied, do so at their own risk.

Reporter's Notes to Rule 4-3(2008)

A 2008 amendment added subsection (f) and relettered the subsequent paragraphs.

Rules of Criminal Procedure

Rule 24.3. Pleading by the Defendant.

CONDITIONAL PLEA FORM

[For use with Rule 24.3(b), Arkansas Rules of Criminal Procedure]

IN THE CIRCUIT COURT OF _____, ARKANSAS

_____ Division

No. _____

STATE OF ARKANSAS

v.

_____, Defendant

CONDITIONAL PLEA

I, _____ (*name of defendant*), with the approval of the court, and the consent of the Prosecuting Attorney am entering a plea of [guilty] [no contest] to Count 1. _____

Count 2. _____

Count 3. _____

I understand my plea is conditioned upon the filing of an appeal on the issue of _____ (*describe pretrial motion [to suppress seized evidence] [to suppress custodial statement] upon which appeal will be based*).

I understand that, if the judge approves my plea of [guilty] [no contest], a judgment

and sentence will be entered, and that I may appeal on the issue specified above in the manner provided by the rules of court.

I understand that if I win my appeal on the issue specified above, that I may withdraw my plea of [guilty] [no contest].

I have read and understand the above. I have discussed the case and my constitutional rights with my lawyer. I understand that by pleading [guilty] [no contest], if my plea is not later withdrawn, I will be giving up my right to a trial by jury, to confront, cross-examine, and compel the attendance of witnesses, and my privilege against self-incrimination. I agree to enter my plea as indicated above on the terms and conditions set forth herein.

Date

Defendant

DEFENSE COUNSEL REVIEW

I have reviewed this conditional plea with my client, and I have discussed with my client its consequences.

Defense counsel

Date

PROSECUTOR APPROVAL

I have reviewed this conditional plea and consent to it.

Prosecutor Attorney

Date

COURT APPROVAL

This Conditional Plea Agreement is approved, and I direct that it be entered of record in this case.

Circuit Judge

Date

This Conditional Plea Form shall accompany the Judgment and Commitment Order Form or Judgment and Disposition Order Form and be made a part of the record in the case.

I certify this is a true and correct record of this Court.

Date: _____ Circuit Clerk/Deputy: _____